REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO 116 OF 2021

BARAZA TINDI.....1ST APPELLANT

JAMES KHISA WAFULA.....2ND APPELLANT

VERSUS

BMW (Minor Suing Through Next Friend **DWL.....RESPONDENT**

RULING

1. By a Motion on Notice dated 15th March, 2021, the applicant herein seeks the following orders:

1) SPENT.

2) SPENT

3) THAT the Court be pleased to grant an order for stay of execution of and/or all decree arising from the Honourable Chief Magistrate's Court (Hon. C. C. Oluoch) judgement delivered on 16th June, 2021 in Mavoko Civil Vase No. 221 of 2020 – BMW (Minor suing Through Next Friend DWL) vs. Baraza Tindi, James Khisa Wafula pending the hearing and determination of the appeal herein.

4) THAT the costs of this Application be provided for.

2. The affidavit in support of the said application was sworn by **Hope Wambugu,** the Principal Legal Associate, Britam General Co. Insurance Limited, the insurers of motor vehicle registration no. KBN 066V at whose instance Civil Suit No. 221 of 2020 in Mavoko was defended.

3. According to the deponent, on 16th June, 2021, the Appellants were held 100% liable jointly and severally and the Respondent was awarded Kshs 506,600/- plus costs and interests. Aggrieved by the said decision both on liability and quantum, the Appellant preferred the instant appeal and is apprehensive that should the said Insurance Company satisfy the said judgement, it would be impossible or difficult to recover the same from the Respondent in the event that the appeal succeeds. This apprehension was based on the fact that the Respondent guardian's whereabouts and assets, if any, are unknown to the Appellants and it would therefore be extremely difficult or impossible to recover the decretal sum if released to him.

4. The said insurance offered to deposit the entire decretal sum in court or in a joint interest earning account so that no party is prejudiced upon the conclusion of the appeal. The Applicant averred that the application was brought without undue delay and that no prejudice would be occasioned to the Respondent if the application is granted provided that an order for security is made and complied with.

5. On behalf of the Applicant, while reiterating the foregoing, it was submitted that the Respondent's guardian is fairly old and it is thus unlikely that he will reimburse the decretal amount of Kshs. 500,6,600/= should the Appeal herein succeed. Moreover, the Respondent herein did not file an Affidavit of means to demonstrate that he was in a good financial position to repay the Appellant the decretal sum in the event it was successful in his appeal. In the absence of the Respondent's proof of his ability to pay the Appellant the said sum, this Court was urged you to find that the Appellant have satisfied the condition that he stands to suffer substantial loss. In support of this contention the Applicant relied on Nairobi HCCA No. 46 of 2008 - **Bata Shoe Co. Ltd vs. Anthony Kaka Nandoya** and Civil Appeal No. 19 of 2019 - **Victory Construction vs. BM (A minor suing through next friend one PMM) [2019] eKLR**.

6. According to the Applicant, substantial loss does not have to be a colossal amount of money as was the position in **Civil Appeal No 634 of 2017 - Magnate Ventures vs. Simon Mutua Muatha & Another [2018] eKLR**.

7. Regarding the delay, it was submitted that judgment in the primary suit was entered on 16th June 2021 and the Applicant's Application was filed on 17th September 2021 hence there is no dispute that this Application was filed without undue delay.

8. On security, it was submitted that **t**he Applicants have already stated their willingness and readiness to deposit the entire decretal sum in court or in a joint interest earning account so that so that no party is prejudiced upon conclusion of the Appeal. In this regard reliance was placed on Nairobi H.C Misc. Application No. 1493 of 2003 **- Putton Ltd –vs- Joseph Mulei Mwasya**.

9. The Applicant submitted that he satisfied the conditions under Order 42 rule 6(2) of the ***Civil Procedure Rules*** and urged the Court to allow the Application.

10. In opposing the Application, the Respondent contended relied on **Victory Construction vs. BM (a minor suing through next friend one PMM) (2019) eKLR, Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 (1990) KLR 365**, **Century Oil Trading Company Ltd vs. Kenya Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** and **Kenya Shell Limited vs. Kibiru (1986) KLR 410** and submitted that the appellant had not proved that he is likely to experience a substantial loss should the application fail. The mere fact that he would have to pay the decretal sum does not amount to a substantial loss on its part as the same is witnessed in all cases. It was further contended that the appellant had not proved to that the appeal, if say is granted, has high chances of succeeding.

11. In opposing the application, the Respondent further relied on Miscellaneous Application No. 42 of 2011, - **James Wangalwa & Another vs. Agness Naliaka Cheseto**, and submitted that the application of Notice of Motion dated 21st July 2021 seeking for stay of execution order, as well as the appeal herein, are only meant to deny the respondent the right to enjoyment of his fruits of his judgment.

12. It was however his position that should the court be persuaded to grant to the appellant a stay of execution of the judgement delivered on 16th June 2021, the court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement. It was proposed that the application, if allowed, should be on conditions shall the Appellants do release half of the decretal sum to the decree holder's advocates and that the balance of the decretal sum be deposited in a joint interest earning account of both advocates on record till the said Appeal is heard and fully determined. In the alternative, the whole decretal sum in Civil Case No. 221 of 2020 be deposited with the court. The said conditions should be within 30 days

Determination

13. I have considered the application, the respective affidavits and the submissions filed as well as the authorities relied upon.

14. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the ***Civil Procedure Rules*** which provides as follows:

> ***No order for stay of execution shall be made under subrule***
>
> ***(1) unless—***
>
> ***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***
>
> ***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***

15. In **Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the ***Civil Procedure Rules*** is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the ***Civil Procedure Act***, the Court is no longer limited to the foregoing provisions. The courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the ***Civil Procedure Act*** or in the interpretation of any of its provisions. According to section 1A(2) of the ***Civil Procedure Act*** "the Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective" while under section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

16. It therefore follows that all the pre-Overriding Objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the ***Civil Procedure Act*** are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when

confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589.** This was the position of **Warsame, J** (as he then was) in **Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani) HCCC 795 of 1997** where he expressed himself as hereunder:

> **"Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court…The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is *prima facie* entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant…For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss… Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation…At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."**

17. Similar view was adopted in in ***RWW vs. EKW* [2019] eKLR**, where it was held that:

> ***"…the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."***

18. It was therefore opined in ***Absalom Dova vs. Tarbo Transporters [2013] eKLR***, *that the discretionary relief of stay of execution pending appeal is designed on:*

> ***"the basis that no one would be worse off by virtue of an order of the court; as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights; the Appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation…"***

19. Therefore, this Court must guard against any action or inaction whose effect may remove pith of this litigation and leave only a shell as was appreciated by the Court of Appeal position in **Dr Alfred Mutua vs. Ethics & Anti-corruption Commission & Others Civil Application No. Nai. 31 of 2016** in which it cited the Nigerian Court of Appeal decision of **Olusi & Another vs. Abanobi & Others [suit No. CA/B/309/2008]** that:

> **"It is an affront to the rule of law to… render nugatory an order of Court whether real or anticipatory. Furthermore… parties who have submitted themselves to the equitable jurisdiction of courts must act within the dictates of equity."**

20. It is trite that in giving effect to the rights the courts must balance fundamental rights of individual against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions. See **Bell vs. DPP [1988] 2 WLR 73.**

21. Apart from that as the Supreme Court appreciated in **Gitirau Peter Munya vs. Dickson Mwenda Kithinji & 2 Others [2014] eKLR**, the Court must consider whether or not it is in the public interest that the order of stay be granted and that this condition is dictated by the expanded scope of the Bill of Rights, and the public spiritedness that run through the Constitution.

22. On the first principle, **Platt, Ag.JA** (as he then was) in **Kenya Shell Limited vs. Kibiru [1986] KLR 410**, at page 416 expressed himself as follows:

> **"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money".**

23. On his part, **Gachuhi, Ag.JA** (as he then was) at 417 held:

"It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

24. Dealing with the contention that the fact that the respondent is in need of finances is an indication that he would not be in position to refund the decretal sum, **Hancox, JA** (as he then was) in the above cited case when he expressed himself as follows:

"I therefore think in the circumstances that these comments were unfortunate. Nevertheless, having considered the matter to the full, and with anxious care, there is in my judgement no justification whatsoever for holding that there is a likelihood that the respondents will not repay the decretal sum if the appeal is successful and that the appeal will thereby be rendered nugatory. The first respondent is a man of substance, with a good position and prospects. It is true his house was, in his words, reduced to ashes, but I do not take that against him. Both seem to me to be respectable people and there is no evidence that either will cease to be so, in particular that the first respondent will not remain in his job until pensionable age."

25. Therefore, the mere fact that the decree holder is not a man of means does not necessarily justify him from benefiting from the fruits of his judgement. On the other hand, the general rule is that the Court ought not to deny a successful litigant of the fruits of his judgement save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court. In **Machira T/A Machira & Co Advocates vs. East African Standard (No 2) [2002] KLR 63** it was held that:

"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".

26. Where the allegation is that the respondent will not be able to refund the decretal sum the burden is upon the applicant to prove that the Respondent will not be able to refund to the applicant any sums paid in satisfaction of the decree. See **Caneland Ltd. & 2 Others vs. Delphis Bank Ltd. Civil Application No. Nai. 344 of 1999.**

27. The law, however appreciates that it may not be possible for the applicant to know the respondent's financial means. The law is therefore that all an applicant can reasonably be expected to do, is to swear, *upon reasonable grounds*, that the Respondent will not be in a position to refund the decretal sum if it is paid over to him and the pending appeal was to succeed but is not expected to go into the bank accounts, if any, operated by the Respondent to see if there is any money there. The property a man has is a matter so peculiarly within his knowledge that an applicant may not reasonably be expected to know them. In those circumstances, the legal burden still remains on the applicant, but the evidential burden would then have shifted to the Respondent to show that he would be in a position to refund the decretal sum. **See Kenya Posts & Telecommunications Corporation vs. Paul Gachanga Ndarua Civil Application No. Nai. 367 of 2001; ABN Amro Bank, N.K. vs. Le Monde Foods Limited Civil Application No. 15 of 2002.**

28. That position was adopted by the Court of Appeal decision in **National Civil Appl. No. 238 of 2005 - National Industrial Credit Bank Limited –vs- Acquinas Francis Wasike & Anor (UR)** where the Court stated as follows: -

"This court has said before and it would bear repeating that while the legal duty is on an Applicant to prove allegation that an appeal would be rendered nugatory because a Respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an Applicant to know in detail the resources owned by a Respondent or lack of them. Once an Applicant expresses a Respondent would be unable to pay back the decretal sum, the evidential burden must then shift to matter which is peculiarly, within his knowledge."

29. What amounts to reasonable grounds for believing that the respondent will not be able to refund the decretal sum is a matter of fact which depends on the facts of a particular case. In my view even if it were shown that the respondent is a man of lesser means, that would not necessarily justify a stay of execution as poverty is not a ground for denial of a person's right to enjoy the fruits of his success. As was held in **Stephen Wanjohi vs. Central Glass Industries Ltd. Nairobi HCCC No. 6726 of 1991,** financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

30. In this case, the Applicant's apprehension arises from the fact that the Respondent is a minor suing through next friend. The said next friend has not sworn as regard his means to refund the decretal sum if paid over to him were the appeal to be ultimately successful. Even if the Respondent had had averred that the next friend is a man of means, that in itself would not necessarily mean that the decretal sum would be readily available in the event that the appeal succeeds, as executing against the next friend may well pause some difficulties. In the case of **Dickson Isabwa Angaluki & 2 Others vs. Ukwala Supermarkets Ltd & 2 others [2013] eKLR** it was held that:

"Substantial loss may be inability to recover, or undue difficulty in recovering, from the respondent the decretal sum in the event that the appeal succeeds, thus rending the appeal nugatory."

31. As was observed by **Kamau, J** in **Civil Appeal No 634 of 2017 - Magnate Ventures vs. Simon Mutua Muatha & Another [2018] eKLR**:-

> **'…substantial loss does not have to be a colossal amount of money. Its sufficient if an applicant seeking a stay of execution demonstrates that it will go through hardship such as instituting legal proceedings to recover the decretal sum it paid to a respondent in the event his or her appeal was successful. Failure to recover such decretal sum would render his appeal nugatory if he or she was successful.'**

32. **In any event, in Halai & Another vs Thornton &Turpin (1963) Limited KLR 1990** the Court of Appeal held that:-

> **"…this court is not prevented from granting a stay of execution where no substantial loss is established and no security is forthcoming if it seems just to the court for such orders to be made upon application."**

33. As for the delay, none was alleged and I do not find that any undue delay in the circumstances of this case.

34. As regards security, I associate myself with the holding in ***Mwaura Karuga T/A Limit Enterprises vs. Kenya Bus Services Ltd & 4 Others*** **[2015] eKLR**, where it was said:

> ***"… the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."***

35. I also agree with the decision in ***Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd*** **[2019] eKLR**, in which the court observed:

> ***"… the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails…Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal … Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."***

36. In the result the order that commends itself to me and which I hereby grant is that there will be a stay of execution of the judgement appealed from pending the hearing and determination of the appeal on condition that the applicant deposits the decretal sum in a joint interest earning account with Kenya Commercial Bank, Machakos Branch within 30 days from the date of this decision and in default, the application will be deemed to have been dismissed in which event the Respondent will be at liberty to execute for the full amount.

37. The costs of the application are awarded to the Respondent in any event.

38. It is so ordered.

READ, SIGNED AND DELIVERED AT MACHAKOS THIS 29TH DAY OF NOVEMBER, 2021.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kirui for the Appellant

Mr Mochama for the Respondent

CA Susan